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In the

Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KERWICK & CURRAN, INC.,
Petitioners,

vs.

BEN COOPER, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

and

BRIEF OF UNITED MISSOURI BANK OF KANSAS CITY, N.A., AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

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The United Missouri Bank of Kansas City, N.A. respectfully moves this Court for leave to file a brief in this case as *amicus curiae*. The consent of the attorneys for petitioners The Insurance Company of the State of Pennsylvania and Kerwick & Curran, Inc. has been obtained, but the attorney for respondent Ben Cooper, Inc. has declined to consent.

Applicant United Missouri Bank is the defendant in an adversary proceeding to recover allegedly preferential monetary transfers pending in the United States District Court for the Western District of Missouri styled *In re Kroh Brothers Development Company, et al.* v. *United Missouri Bank of Kansas City, N.A.*, Adversary No. 89-4035-1-11. Applicant United Missouri Bank was also the petitioner in a petition for writs of mandamus and prohibition filed in the United States Court of Appeals for the Eighth Circuit arising from said adversary proceeding in which the central issue was whether a bankruptcy judge acting under the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, has the statutory and constitutional authority to conduct jury trials in an adversary proceeding. *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (8th Cir. 1990).

Contrary to the earlier holding of the Court of Appeals for the Second Circuit in the case at bar, the Eighth Circuit, on April 23, 1990, held that a bankruptcy judge lacks the statutory authority to conduct jury trials in an action alleging a preferential transfer between the debtor and a third-party creditor. *In re United Missouri Bank*, *supra*.

Applicant United Missouri Bank has a real interest in the outcome of this case because its right to a jury trial conducted by an Article III judge recognized by the Eighth Circuit Court of Appeals in the aforesaid mandamus and prohibition action may be jeopardized by a contrary opinion in this case.

Applicant United Missouri Bank perceives that important issues of statutory construction and constitutional law will not be fully presented by the parties to this case in view of the fact that the

issue of the constitutionality of jury trials conducted by Article I bankruptcy judges was not raised by the parties in their appeal to the Court of Appeals, *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1403 (2nd Cir. 1990), and the essential predicate question thereto, whether bankruptcy judges have the statutory authority to conduct jury trials, was not raised in the petitioners' petition for writ of certiorari to this Court in this case, matters which counsel for applicant United Missouri Bank has fully briefed and argued before the Eighth Circuit in *In re United Missouri Bank*, *supra*.

For the above and foregoing reasons, the United Missouri Bank of Kansas City, N.A. respectfully requests this Court to grant it leave to file its brief *amicus curiae* in this case.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

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United Missouri Bank has a real interest in the outcome of this case because its right to a jury trial conducted by an Article III judge recognized by the Eighth Circuit Court of Appeals in the aforesaid mandamus and prohibition action may be jeopardized by a contrary opinion in this case.

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SUMMARY OF THE ARGUMENT

Bankruptcy judges acting under the Bankruptcy Amendments and Federal Judgeship Act of 1984 (hereinafter "BAFJA") lack express or implicit statutory authority to conduct jury trials in adversary proceedings. The language of BAFJA does not grant jury trial authority, and congressional and historical support for that authority is lacking. Given the absence of supporting legislative history, and the serious constitutional problems posed by bankruptcy judges exercising jury trial authority, BAFJA should be construed as not conferring such authority.

Even assuming Congress intended that bankruptcy judges be allowed to preside over jury trials, bankruptcy judges lack the constitutional authority to do so. The Constitution commands that all federal judicial authority must be exercised by an Article III court. Bankruptcy judges lack the intrinsic constitutional characteristics and essential attributes of Article III judges. To allow a bankruptcy judge to preside over a jury trial would represent a constitutionally impermissible delegation of judicial power to a non-Article III judge and would deprive an individual litigant of his constitutional right to a jury trial before an Article III judge.

The Seventh Amendment right to a jury trial presumes the personal presence of an Article III district judge. To allow a bankruptcy judge, not imbued with the attributes of an Article III judge, to preside over a jury trial is tantamount to a denial of the individual litigant's Seventh Amendment right to a jury trial. In addition, the standards of review established by Congress regarding orders entered by bankruptcy judges – *de novo* in non-core proceedings, "clearly erroneous" in core proceedings – do not comport with the standard for review of a jury verdict "according to the rules of common law" as required by the Seventh Amendment. Even assuming the district court could ignore or declare invalid the scheme of review established by Congress and could apply the "no substantial evidence" test when the matter finally came before it, such an approach would deprive the district court of the power and right to make the ultimate decision in the case and thus would violate Article III.

ARGUMENT

I.

There is No Statutory Authorization Afforded Bankruptcy Judges or Bankruptcy Courts to Conduct Jury Trials.

Despite the fact that a central issue in this case is a bankruptcy judge's constitutional power to preside over a jury trial, it is this Court's settled policy "to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez* v. *United States*, _____ U.S. _____, 109 S.Ct. 2237, 2241 (citations omitted). In this case, such an alternative interpretation of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (hereinafter "BAFJA") is afforded by the lack of express statutory authority and absence of legislative history in support of jury trials in bankruptcy courts. Indeed, as explained by the United States Court of Appeals for the Eighth Circuit in its well-considered opinion in *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (8th Cir. 1990), such an alternative interpretation of BAFJA "is not only reasonable, but necessary." *Id.* at 1457.[1]

In *In re United Missouri Bank* the bankruptcy trustee sought recovery of alleged preferential transfers against a bank that had not filed a claim against the debtor's estate. The bank requested a jury trial. Both the bankruptcy court and the district court held that under *Granfinanciera, S.A.* v. *Nordberg*, _____ U.S. _____, 109 S.Ct. 2782 (1989), the bank was entitled to a jury trial and that the bankruptcy court had the statutory authority to conduct such a trial. The Eighth Circuit agreed that the bank had a right to a jury trial but reversed the bankruptcy court and district court as to in which court the trial would be conducted and as to what judge would preside over the trial.

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1 On this point the Eighth Circuit found persuasive the recent decision of the Fifth Circuit in *In re Hipp, Inc.*, 895 F.2d 1503, 1509 (5th Cir. 1990) (where constitutionality of bankruptcy courts exercising criminal contempt authority was questionable, court would construe BAFJA as not conferring that authority).

After an in-depth historical review of the authority of bankruptcy courts, the Eighth Circuit held there to be no express or implied statutory authority granted to a bankruptcy court to conduct jury trials. The court noted that BAFJA contained no specific or express language granting a bankruptcy judge authority to conduct jury trials. It further noted that "Congress has previously provided express statutory authority to conduct jury trials to a non-Article III tribunal, *see* 28 U.S.C. §636(a)(3), (c)(1) (1982) (statutory authority of magistrates to conduct jury trials in certain cases), and thus, we believe, is aware of the language necessary to expressly grant that authority. The language of the 1984 Act does not grant jury trial authority." *Id.*, 901 F.2d at 1454 (footnote omitted).

In concluding there was no implied authority, the Eighth Circuit stated (901 F.2d at 1456) (footnote omitted):

> [In enacting the 1984 Act] . . . Congress simply intended to transfer all proceedings relating to the bankruptcy estate to the sole jurisdiction of the bankruptcy court without regard to whether a party was entitled to a jury trial, or which forum would conduct the trial. In fact, it appears Congress did not even consider the need to provide jury trial authority. As the Supreme Court pointed out: "Thus, the 1984 Amendments' denial of the right to a jury trial in preference and fraudulent conveyance actions can hardly be said to represent Congress' considered judgment of the constitutionality of this change." *Granfinanciera*, 109 S.Ct. at 2800 n. 16. If Congress did not consider the constitutionality of denying jury trials, we doubt if it considered the need to provide for authority for the bankruptcy court to conduct a jury trial.

The Second Circuit below, although recognizing that there was no specific statutory provision authorizing jury trials, held there to be implied authority for jury trials in bankruptcy courts. The Second Circuit held that such authority must be implied to reconcile the congressional intent evident in the power granted

in BAFJA. The court reasoned that "*Granfinanciera* teaches that . . . [core] proceedings, if legal in nature, are subject to the Seventh Amendment, but that opinion does not alter Congress' intent that they be heard by a bankruptcy court with authority to issue final orders." *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1402 (2d Cir. 1990). According to the Second Circuit, construing the Bankruptcy Code to allow jury trials in the bankruptcy court is the only way to reconcile these various concerns. *Id.*

As cogently explained by the Eighth Circuit in *In re United Missouri Bank*, the Second Circuit's reasoning is a "faulty syllogism." 901 F.2d at 1456. The reasoning of the Eighth Circuit that there is no statutory authority, express or implied, for jury trials to be conducted in the bankruptcy court is sound. Merely because the Second Circuit perceived it may be difficult to reconcile the holding in *Granfinanciera* with BAFJA does not warrant the implication that Congress intended something it apparently never considered.

II.

A Jury Trial in Bankruptcy Court Would Violate Article III of the Constitution.

Because the Eighth Circuit in *In re United Missouri Bank* properly found that there was "no statutory authorization afforded bankruptcy judges or courts to conduct jury trials on legal proceedings," 901 F.2d at 1457, the court there did not reach the constitutional questions[2] of whether jury trials conducted in the bankruptcy court would violate Article III and the Seventh Amendment. *Id.* The Second Circuit in the case below did reach the constitutional question and held that jury trials by bankruptcy courts in core proceedings did not violate the constitutional hurdles presented. *In re Ben Cooper*, 896 F.2d at 1403-04. Specifically, regarding the Article III considerations, the Second Circuit

2 *Cf. Gomez*, 109 S.Ct. at 2246 n. 25 (because this Court decided that the Federal Magistrates Act did not allow the delegation of jury selection to magistrates, this Court did not consider whether such a delegation would be constitutional).

reasoned that because "bankruptcy courts have the power to enter final judgments without violating Article III, it follows that jury verdicts in the bankruptcy courts do not violate Article III." *Id.* at 1403.

Like the Second Circuit's reasoning regarding the statutory authority issue, its reasoning regarding the Article III considerations is a "faulty syllogism." First, in reaching its conclusion, the Second Circuit assumed, without deciding, that the statutory authority of bankruptcy courts found in 28 U.S.C. §157(b) did not violate Article III. *Id.* at 1403. This assumption is open to serious question. *See In re Davis*, 899 F.2d 1136, 1140 n. 9 (11th Cir. 1990) (dictum). Second, even if 28 U.S.C. §157(b) is not unconstitutional in its entirety, jury trials presided over by bankruptcy judges do not comport with Article III.[3] In fact, where, as here, petitioners admittedly have a Seventh Amendment right to a jury trial,[4] exactly the opposite conclusion must necessarily follow, to-wit: Article III requires that any such jury trial be presided over by an Article III judge.

In *Granfinanciera* this Court declared unconstitutional Congress' statutory scheme under BAFJA which drastically restricted litigants' rights to jury trials. This Court there held that the Seventh Amendment entitles a person (such as petitioners here) who has not submitted a claim against a bankruptcy estate to a jury trial when sued by the trustee in bankruptcy, notwithstanding Congress' designation of fraudulent conveyance actions as "core proceedings" in 28 U.S.C. §157(b)(2)(H).

This Court in *Granfinanciera* specifically reserved ruling on the question of whether the jury trial mandated by the Seventh

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3 A most recent detailed analysis concluding that the bankruptcy court is without constitutional authority to conduct jury trials is found in Bankruptcy Judge Waldron's decision in *In The Matter of Hughes-Bechtol, Inc.*, 107 B.R. 552 (Bkrtcy. S.D.Ohio 1989). In addition to the constitutional issues Judge Waldron noted that there presently is no statutory authority whatever which specifically empowers a bankruptcy court to conduct a jury trial.

4 The Second Circuit below properly held that petitioners had a right to a jury trial. *In re Ben Cooper*, 896 F.2d at 1402. Respondent has not cross-petitioned for reversal of that ruling.

Amendment could be held in the bankruptcy court or whether it must be conducted by the district court. However, its opinion expressly recognized that "if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders *requires the same answer* as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal." 109 S.Ct. at 2796 (emphasis added). It is clear from the logic employed by the majority in *Granfinanciera* that any delegation of jury trial authority to a non-Article III bankruptcy judge would not comport with Article III (109 S.Ct. at 2796):

> For if a statutory cause of action, such as respondent's right to recover a fraudulent conveyance under 11 U.S.C. §548(a)(2), is not a "public right" for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking "the essential attributes of the judicial power" . . . [and] if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury fact finder.

Where, as here, petitioners are entitled to the protection of the Seventh Amendment, so too the resolution of this controversy must come within the judicial authority of the United States and is to be determined only by an Article III court.

A. A Jury Trial in Bankruptcy Court Would Violate the Concept of Separation of Powers.

Article III, Section 1. of the Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as

> the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

This "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States . . . ." Article III, Section 2.

As noted by now-Justice Kennedy in *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir.) (en banc), *cert. denied*, 496 U.S. 824 (1984):

> We have observed that separation of powers protections, in some cases, have two components. One axis reaches to the person affected by government action and encompasses his or her relation to a constitutional branch; the other axis runs from each governmental branch to the others to ensure separation and independence in the constitutional structure. . . . Where a case is transferred or assigned from an Article III court to a different forum, both the rights of the parties and the relations between the separate branches of the government are implicated.

Id., 725 F.2d at 541 (citation omitted). Both elements identified by Justice Kennedy are implicated in this case. To allow the bankruptcy judge to preside over this jury trial would represent a constitutionally impermissible delegation of judicial power to a non-Article III judge and would deprive petitioners of their constitutional right to a jury trial before an Article III tribunal.

1. A Jury Trial in Bankruptcy Court Would Constitute an Improper Delegation of the Essential Attributes of Judicial Power.

The seminal case in determining the limits of the bankruptcy court's jurisdiction under Article III is *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

This Court there reviewed the attempted Congressional extension of bankruptcy jurisdiction in the 1978 Act and found that it violated Article III:

> As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial Branch. It provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, §1. *The inexorable command of this provision is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III.*

458 U.S. at 58-59 (emphasis added). This Court found that bankruptcy judges lacked the essential attributes of Article III judges: they hold office only for a term of years, can be removed from office other than by impeachment and their compensation may be decreased during their term of office. Thus, this Court held, bankruptcy judges could not be allowed to exercise the judicial power of the United States as had been intended by Congress in the Bankruptcy Act of 1978.

Appellants in *Northern Pipeline* attempted to justify the position of the bankruptcy judges as adjuncts of the district court who did not independently exercise judicial authority but who worked with the district courts and assisted them in exercising their responsibilities. This Court rejected that argument as constitutionally insufficient and established a two-pronged test to determine when judicial responsibility can be assigned to a non-Article III tribunal:

> [First] . . . with respect to congressionally created rights, some factual determinations may be made by a specialized fact finding tribunal designed by Congress, without constitutional bar, ... Second, the functions of the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Art. III court.

458 U.S. at 80-81.

Included among the "essential attributes" of judicial power by the *Northern Pipeline* court was "the power to preside over jury trials. . . ." 458 U.S. at 85. Subsequently, in *CFTC* v. *Schor*, 478 U.S. 833, 853 (1986), this Court observed that the power to preside over jury trials was one of the "essential attributes of judicial power" of the United States. A jury trial conducted by a bankruptcy judge would deprive the district court of all essential elements of the judicial power and thus fail the second prong of the *Northern Pipeline* test.

In *United States* v. *Raddatz*, 447 U.S. 667 (1980), this Court approved referral of pretrial matters to a United States magistrate pursuant to 28 U.S.C. §636(b) so long as the district court retained control of the litigation. As noted by Chief Justice Burger, 447 U.S. at 683 (emphasis added):

> [A]lthough the statute permits the district court to give to the magistrate's proposed findings of fact and recommendations "such weight as [their] merit commands and the sound discretion of the judge warrants," . . . that delegation does not violate Art. III *so long as the ultimate decision is made by the district court.*

A jury trial conducted by a bankruptcy judge would place all the power and authority of a trial judge in the hands of an Article I tribunal, and an Article III judge could only review the transcript of proceedings on appeal. This is constitutionally impermissible.[5] As observed in *Northern Pipeline*, 458 U.S. at 86 n. 39:

> Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations

5 *Raddatz*, 447 U.S. at 680-83, upheld the referral of a non-jury matter to a U.S. Magistrate because, by statute, the district court was empowered to review the magistrate's decision *de novo*. Thus the district judge made the "ultimate decision" in the case. *De novo* review is not available in a jury trial because the Seventh Amendment proscribes reexamination of facts determined by a jury.

> of law, as well as the nature of the case as it has been shaped at the trial level.

Nor can the delegation of jurisdiction to preside over jury trials be justified by arguing that a bankruptcy judge sits as a mere adjunct of the district court and would merely be exercising the district court's jurisdiction by presiding over a jury case. This argument was considered and rejected by Chief Judge Lay in his dissent in *Lehman Bros. Kuhn Loeb, Inc.* v. *Clark Oil & Refining Corp.*, 739 F.2d 1313, 1318 (8th Cir. 1984) (en banc), *cert. denied*, 104 U.S. 158 (1985):

> To urge, . . . that magistrate appointment, case reference and recall, and appellate review is sufficient Article III supervision ignores, I feel, the historical underpinnings of Article III. The magistrate's role is not limited to that of an adjunct. These non-Article III judges have been given power to adjudicate "laws of national applicability and affairs of national concern." *Palmore* v. *United States*, 411 U.S. 389, 408, 93 S.Ct. 1670, 1681, 36 L.Ed.2d 342 (1973). This, I feel, is an unconstitutional delegation, by Congress, of the judicial power of the United States to judges that are not protected by the dictates of Article III.

For purposes of this brief it is not necessary to engage in an extended discussion of the doctrine of separation of powers and the dangers inherent in allowing Congress or the courts themselves to assign the "essential attributes" of the judicial power to non-Article III tribunals. Those topics are fully discussed in *Northern Pipeline* and in the excellent exposition of Judge Schroeder in his dissent in *Pacemaker Diagnostic*, 725 F.2d at 547-55. It is sufficient here to note that Article III prohibits either Congress or the district courts from delegating the power to preside at jury trials to Article I bankruptcy judges.

2. A Jury Trial in Bankruptcy Court Would Deprive an Individual Litigant of His Right to a Trial Before an Article III Judge.

In *Schor* this Court recognized that Article III confers upon a litigant a "*personal right*" to "an impartial and independent federal adjudication of claims within the judicial power of the United States." 478 U.S. at 848 (emphasis added). *See Glidden Co.* v. *Zdanok*, 370 U.S. 530, 536 (1962) ("basic constitutional protections designed in part for the benefit of litigants"); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 22 (1955) (Art. III entitled ex-serviceman to the "safeguards afforded those tried in the regular courts"); *Ng Fung Ho* v. *White*, 259 U.S. 276, 285 (1922) (persons invoking a constitutional determination of their claims"). As noted by Justice Kennedy in his discussion of jury trials conducted by magistrates in *Pacemaker Diagnostic*, 725 F.2d at 541:

> . . . [W]e recognize the principle that parties to a case or controversy in a federal forum are entitled to have the cause determined by Article III judges . . .[6]

This right presumes the presence of an Art. III judicial officer: a judge whose ability to be "impartial and independent" is secured by lifetime tenure and an irreducible salary. *Northern Pipeline*, 458 U.S. at 59. A bankruptcy judge is not such an officer, *Northern Pipeline*, 458 U.S. at 460, nor is a magistrate, *Raddatz*, 447 U.S. at 704 (Marshall, J., dissenting). If a bankruptcy judge is allowed to preside over a jury trial, then the litigant will be deprived of this constitutional right.

However, as noted in *Lehman Bros.*, 739 F.2d at 1315, citing *Goldstein* v. *Kelleher*, 728 F.2d 32, 35 (1st Cir. 1984):

> [I]nsofar as Article III protects individual litigants, those protections can be waived. *Cf. Patton* v. *United States*,

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6 Justice Kennedy notes that this right is subject to some exceptions "yet to be fully delineated by the Supreme Court," 725 F.2d at 541, citing *Northern Pipeline*. Those exceptions undoubtedly involve the public rights/congressionally created rights doctrine, territorial courts and the courts of the District of Columbia, and military courts. *See Northern Pipeline*, 458 U.S. at 64-70.

> 281 U.S. 276, 281 [50 S.Ct. 253, 74 L.Ed. 854] (1930) * * * (waiver of sixth amendment guarantee of trial by jury). The plaintiff as well as the defendant here voluntarily consented to have this action handled through to judgment by a magistrate.

Thus, the circuits have recognized that even though an individual litigant has a personal right to have an Article III judge preside at a trial, this "Due Process" right is satisfied when the parties consent to the referral of the case to an Article I magistrate. Conversely, as in this case, when a party has refused to consent, reference has been held unconstitutional. As observed in *In re Wickline*, 796 F.2d 1055, 1058 (8th Cir. 1986) (citations omitted):

> In fact, references under [28 U.S.C. §636(c)] were found permissible and not in violation of the parties' due process rights primarily because of the requirement that all parties and the district court consent to the transfer of the case to the magistrate.

Petitioners here have not consented to have this matter tried before an Article I judge. Indeed, petitioners have consistently denied the bankruptcy judge's jurisdiction to proceed with a jury trial. The bankruptcy judge is but an Article I tribunal, and since petitioners have not consented to his jurisdiction, he cannot consistent with the Constitution preside at the trial of this case.

III.

A Jury Trial in Bankruptcy Court Would Violate the Seventh Amendment to the Constitution.

The Seventh Amendment to the Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Granfinanciera resolved the question of whether parties such as petitioners have a right to have actions such as this heard and determined by a jury. Simply impaneling a jury does not, however, satisfy petitioners' right to a trial by jury as required by the Seventh Amendment. A jury is an essential component of a party's Seventh Amendment right, but the right encompasses more. Equally important to the concept of trial by jury is the question of who should preside at the trial. Because a "jury trial" by definition involves the judicial power of the United States, the trial must be conducted by an Article III judge.

A. An Article III Judge Must Preside Over a Seventh Amendment Jury Trial.

A litigant's Seventh Amendment right to have a district judge preside over a jury trial is similar to his rights under Article III. There is a distinction, however. From a litigant's standpoint, Article III rights relate generally to the quality of the administration of justice. The Seventh Amendment concern is more specific: the effect a presiding officer has on a jury trial.

This concern was discussed in depth by Judge Posner in his dissent in *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1048-49 (7th Cir. 1984):

> Appellate review in the federal system leaves great power in the hands of the district judges; and as noted earlier, magistrates' decisions under section 636(c) are reviewed under the identical standards as district judges' decisions. Appellate control over the conduct of jury trials, as in this case, is especially limited. The tone in which the trial judge addresses the jurors, counsel, and witnesses; his rulings on evidence (especially evidence sought to be excluded as cumulative or prejudicial); his management of the pace of the trial; his decisions on the length and phrasing of the jury instructions; the manner in which he reads or paraphrases the instructions to the jury; his supervision of the jury's deliberations — these discretionary aspects of the trial judge's responsibility are largely beyond the power of an appellate court to correct, yet they can influence a jury's verdict. Federal

> district judges can even comment to the jury on the weight of the evidence (though they rarely do so nowadays). So could magistrates presiding under section 636(c).

See also Gomez, 109 S.Ct. at 2247.

The Seventh Amendment right to a jury trial presumes the personal presence of an Article III district judge.

> "Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an *officer* vested with authority to cause them to be summoned and empaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a *trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them* on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence.

Capital Traction Co. v. Hof, 174 U.S. 1, 13-14 (1899) (emphasis added).

The fact that a bankruptcy judge may be more or less competent to preside over a jury trial than a district judge is irrelevant.[7] As recognized by Judge Posner, and as is known to any lawyer who has ever tried a jury case, the judge presiding over a jury is a vital, intrinsic element of the trial. In the federal courts jury trials "are under the *constant* superintendence of the trial judge . . . [who is] 'not a mere moderator,' but 'is the governor of the trial' . . ." *Crowell v. Benson*, 285 U.S. 22, 61 (1932) (emphasis added).

Petitioners have a Seventh Amendment right to have this jury case tried by a judicial officer appointed by the President with the advice and consent of the Senate, serving during good behavior

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7 In *Glidden Co.*, 370 U.S. at 533-34, this Court indicated that Article I judges may not bind litigants in Article III courts, no matter how impeccably they conduct the proceedings.

for a compensation which cannot be reduced during the judge's term of service. Congress has the power to imbue bankruptcy judges with these attributes, but it has not chosen to do so.

B. A Jury Trial in Bankruptcy Court Would Require Abandonment of the Existing Scheme of Appellate Review.

The very question of review of a bankruptcy court's determination of the facts raises serious constitutional questions if a bankruptcy court is to determine factual issues by jury verdict. The Seventh Amendment to the United States Constitution provides:

> [N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Bankruptcy judges' orders in non-core proceedings are to be reviewed *de novo*, 28 U.S.C. §157(c)(1); orders and judgments in core proceedings are reviewed under a "clearly erroneous" standard. Bankruptcy Rule 8013. Neither standard equates with the standard for review of a jury verdict "according to the rules of the common law" as required by the Seventh Amendment. Although the *de novo* or clearly erroneous standard of review may not run afoul of the Seventh Amendment when appropriately applied to factual findings in a bench-tried case, *see United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948), it would violate the Seventh Amendment to permit such judicial review of the verdict of a jury under either standard.

According to the rules of the common law, a verdict is to be reviewed only to determine whether or not substantial evidence exists to support it. *See, e.g., Granberry* v. *O'Barr*, 866 F.2d 112, 113 (5th Cir. 1988). Review of the findings of fact, *i.e.*, the verdict of the jury, under a *de novo* standard would be tantamount to denial of a jury trial. *See In re Wickline*, 796 F.2d at 1057. Review under the clearly erroneous standard would likewise

impermissibly allow the substitution by the district court or bankruptcy judge panel of its findings for those of the jury.

Nor is this problem avoided if the district court simply applies the "no substantial evidence" test when the matter finally comes before it. Such an approach would not only require the district court to ignore or declare invalid the scheme of review established by Rule 8013 and 28 U.S.C. §157(c)(1), but also deprive the district court of the power and right to make the ultimate decision in the case and thus would violate Article III. *Raddatz*, 447 U.S. at 683.

Furthermore, 28 U.S.C. §158 provides that review *may* be by a panel of three *bankruptcy* judges instead of by an Article III district judge. To permit any review of a jury verdict by a panel of non-Article III bankruptcy judges would violate the Article III limitations on the delegation of judicial power.

A jury trial of this case before a bankruptcy judge presents insurmountable problems. A litigant's Seventh Amendment right can only be preserved by a jury trial presided over by an Article III judge.

CONCLUSION

In view of the above and foregoing arguments and authorities cited in support thereof, *amicus curiae* respectfully urges that this Court reverse the holding of the Second Circuit below that the jury trial which petitioners have demanded and to which they are entitled may be held in the bankruptcy court.

Respectfully submitted,

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